9-12-2005

New York Case Law Reaches Maturity

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Written for Publication in the New York Law Journal
September 12, 2005

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Abstract: Through a review of recent case history, this article examines the role of courts in land use decisions. The consensus of the holdings is that a court should not substitute it's discretion for that of a local land use board so long as the board's decision was based on substantial evidence on the record. The rational for this standard of deference is based on the idea that local land use boards are legislative bodies that understand the needs of the communities they serve. This article highlights several instances where appeals courts reign in the power of trial courts that overstepped judicial bounds by annulling valid land use board decisions.

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During the 2004-2005 Term, the New York Court of Appeals handed down decisions covering a broad range of issues in land use and property law. Evident in the court's decisions this term is the maturity of New York case law. Many of its major holdings correct the decisions of lower courts that misapplied or misunderstood previously-settled principles. The Court of Appeals continued this year to struggle with the U.S. Supreme Court's holdings in the regulatory takings field. Subsequent to this term's takings decision (*Smith v. Mendon*), the U.S. Supreme Court clarified this area of law in *Lingle v. Chevron.* Future Court of Appeals cases will follow the Court's simplified tests for takings; this will modify the rationale, rather than the results, of New York cases on the subject.

Regulatory Takings

In *Smith v. Town of Mendon*,[1] the Court of Appeals held that a conservation restriction imposed as a condition to site plan approval is not an exaction and is not subject to heightened judicial scrutiny under the *Nollan/Dolan* tests when challenged as a regulatory taking. The Mendon Planning Board conditioned its approval of the Smiths' single family home proposal on the filing of conservation restriction covering portions of the parcel located within the town's environmental protection overlay districts. The court declined "to extend

the concept of exaction where there is no dedication of property to public use and the restriction merely places conditions on development."[2] The court instead reviewed the case using the Supreme Court's *Agins* test and found that the conservation restriction did not constitute a taking because it did not deny the Smiths all economically viable use of their property and "the conservation restriction substantially advances a legitimate government purpose – environmental preservation."[3]

On May 23, 2005, in *Lingle v. Chevron U.S.A. Inc*.,[4] the Supreme Court "correct[ed] course" in a unanimous decision holding that the *Agins* "substantially advances" formula is not an appropriate test for determining whether a regulation constitutes a taking under the Fifth Amendment. The "formula prescribes an inquiry in the nature of a due process, not a takings, test, and . . . it has no proper place in . . . takings jurisprudence."[5] The effect of the Court's holding and its explanatory dicta is to clarify greatly the field of regulatory takings law as applied to land use regulations and agency determinations.

The Court in *Lingle* identifies four categories of regulatory takings cases. The first two categories are *per se* takings: void on their face without regard to the extent of their impact on aggrieved property owners. "First, where government requires an owner to suffer a permanent physical invasion of her property – however minor – it must provide just compensation."[6] "A second categorical rule applies to regulations that completely deprive an owner of '*all* economically beneficial use' of her property."[7] The third category, land use exactions, involves the imposition by a land use approval board of a condition requiring a landowner dedicate an easement allowing public access to her property – the effect of which is to oust the landowner from a portion of her domain.[8]

All other regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*."[9] The *Penn Central* "principal guidelines" are: the economic impact of the regulation on the claimant, particularly the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental regulation. "[T]he *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests."[10] Under current takings jurisprudence, the Court of Appeals in *Smith* would have analyzed the conservation restriction using the *Penn Central* test and not the *Agins* test.

Confirming Existing Jurisprudence

Zoning and Planning

In the *Matter of Crown Communication New York, Inc. v. Department of Transportation of the State of New York, City of New Rochelle et al.*,[11] the Court

of Appeals held that the commercial telecommunication providers are exempt from local zoning with regard to the installation of private antennae on state owned telecommunication towers. In 1997, Castle Tower Holding Corporation (later assigned to Crown Communication New York, Inc.) and the New York State Police, on behalf of participating State agencies, entered into an agreement providing Castle with an exclusive license to build and operate telecommunications towers on state-owned lands and rights-of-way. The agreement also allowed for the licensing of space on the towers to localities and commercial wireless providers. Crown identified two sites for towers in the City of New Rochelle along the Hutchinson River Parkway and licensed space on the towers to several private telecommunications companies. Crown constructed one of the towers and then began construction on the second tower at which time the City issued a stop work order, claiming that a special permit from the City was necessary for the construction of the towers in compliance with local zoning.

In 2001, Crown commenced an action to prohibit the City from enforcing its zoning and to declare that the towers were immune from local regulation. The Court of Appeals held that Crown and the private wireless telecommunications providers were exempt from the local zoning laws. "[T]elecommunication companies 'are not precluded from enjoying the State's immunity simply because they are private entities or because co-locating on the DOT's towers will advance their financial interest.'"[12] "[I]t is not the private status of the Wireless Telephone Providers but, rather, the public nature of the activity sought to be regulated by the local zoning authority that is determinative in this case."[13]

The court applied the *County of Monroe* "balancing of public interests" test and weighed "the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interest."[14] The court held that the State provided evidence that the towers would afford numerous benefits to the public, including the development of a Statewide Wireless Network and the Intelligent Transportation System that collects information on traffic flow, weather, and road conditions. The court held that "the installation of licensed commercial antennae on the towers should also be accorded immunity because co-location serves a number of significant public interests that are advanced by the State's overall telecommunications plan."[15] The fact that the private wireless providers will profit from use of the towers does not undermine the public interest served.[16] "[T]he public and private uses of the towers are sufficiently intertwined to justify exemption of the wireless providers from local zoning regulations."[17]

In *Town of Concord v. Du*we,[18] the Court of Appeals upheld Duwe's convictions for violating the local recycling ordinance and zoning ordinance resulting from the operation of a commercial mulching operation using tree bark on his property. The court held that the local ordinances were not preempted by or inconsistent with the state Solid Waste Management Act. "[L]ocal laws

governing municipal solid waste management broader than—but consistent with—the state legislation are explicitly permitted by the Environmental Conservation Law."[19] In 1980, in *Monroe-Livingston Sanitary Landfill, Inc. v. Caledonia*, the court held the solid waste disposal provisions in the Environmental Conservation Law did not preempt the field of waste management. When the legislature enacted the Solid Waste Management Act in 1988 it could have chosen to preempt the field in light of *Monroe-Livingston*, but did not. The court concluded that the legislature did not intend to preempt the field and local governments are free to enact and enforce ordinances to deal with local waste. In addition, the local ordinance's definition of solid waste was not inconsistent with the Solid Waste Management Act.

As it has several times in recent terms, the Court of Appeals had to restrain lower courts from substituting their judgments for those of local land use boards. In *Metro Enviro Transfer v. Village of Croton-On-Hudson*,[20] the Court of Appeals reiterated the role of the courts in reviewing discretionary land use decisions.[21] The court upheld the village board of trustees' denial of Metro Enviro Transfer's application for renewal of its special use permit to operate a waste transfer facility in the village. The original permit gave the village the right to revoke it if any of its conditions or limitations were violated. On numerous occasions Metro intentionally violated the conditions in the permit and the board refused to reissue the permit as a result. Metro Enviro Transfer argued and the supreme court agreed that because there was no actual harm to the community or the environment, the board's denial of the permit renewal was arbitrary and capricious and not supported by substantial evidence. During the three-year special permit, Metro exceeded the capacity limitations on 26 occasions and falsified records to hide the excesses. The facility accepted prohibited waste at least 42 times, did not adequately train its personnel, kept insufficient records, and inappropriately stored tires on the site. Metro admitted to these violations and paid fines for many of the violations.

Following extensive hearings, the board denied Metro's application to renew its permit. In support of its decision, the board released a 15-page statement of findings which included a chart summarizing the violations. In the statement, the board relies significantly on the opinion of the town consultant who stated that Metro continually violates regulations that are designed to protect health and the environment despite its promises to improve.

The Court of Appeals concluded that "[a]lthough inconsequential violations would not justify non-renewal, the many violations here, and their willful nature, sufficiently support the [b]oard's decision."[22] The board's decision whether to grant or renew a special permit is discretionary and will be upheld as long as it has a proper basis and is not based solely on generalizations. "'[E]xpert opinion . . . may not be disregarded in favor of generalized community objections,'"[23] but as long as there are other grounds in the record for the decision it will be upheld.

The court held that substantial evidence of actual harm was not necessary and the threat of harm from the repeated willful violations was sufficient grounds to deny the renewal.

"There may, of course, be instances in which an applicant's violation is so trifling or de minimis that denying renewal would be arbitrary and capricious."[24] Here, the board reviewed a substantial amount of evidence, it heard contradictory evidence from Metro's expert and its own, considered the evidence and concluded that it could not continue to rely on Metro's assurances of compliance. "A reviewing court 'may not substitute its own judgment for that of the board, even if such a contrary determination is itself supported by the record.'"[25] According to the court, even without the expert testimony, there was sufficient evidence to sustain the board's denial of Metro's renewal application.

Real Property Tax

In *Malta Town Centre I, Ltd. v. Town of Malta Board of Assessment Review*,[26] the Court of Appeals held that a reassessment under Real Property Tax Law (RPTL) § 1573 can constitute an exception under the RPTL § 727 three-year respite from any change in the assessed valuation of property. In 2001, the Town and Town Centre entered into a stipulation that reduced the assessed value of the Town Centre's property to $7,800,000 for the 1998,1999, 2000, and 2001 tax years. The stipulation stated that the property would be subject to RPTL § 727 which provides for a three-respite from any change in the assessed valuation of the property. An exception to the three-year grace period is when "a revaluation or update of all real property on the assessment roll" is conducted. In 2002, a RPTL § 1573 reassessment was done by the town resulting in an increased assessed valuation for the Town Centre's property to $9,750,000. RPTL § 1573 gives aid to municipalities that "annually conduct a systematic analysis of all locally assessed properties using a methodology specified in . . . regulations [promulgated by the state board; and] annually revising assessments as necessary to maintain the stated uniform percentage value."[27] The Court of Appeals concluded that the RPTL § 1573 reassessment is evidence of "a revaluation or update of all real property on the assessment role"[28] satisfying the exception to the RPTL § 727 three-year reprieve from changed assessments.

In *New York Telephone Company v. Supervisor of the Town of Oyster Bay*, the Court of Appeals held that "RPTL 102(14) does not authorize the town to impose a special ad valorem levy for garbage collection on NYTC's mass properties because they do not and cannot receive any direct benefit from the municipal service."[29] NYTC owns telephone lines, poles, and other related equipment on private and public land throughout the town. It does not own any of the land where the equipment is located. The town imposed on NYTC an ad valorum levy fee for garbage collection. NYTC challenged the levy because it does not benefit from the garbage collection service as stated in the RPTL §

102(14) definition of ad valorem. A property is benefited if it is capable of receiving the services funded. The inquiry is based on the "innate features and legally permissible uses of the property, not the particularities of its owners or occupants or the state of the property at a fixed point in time."[30] NYTC's equipment is incapable of producing refuse and therefore cannot benefit from garbage collection. The court concluded that the ad valorem levies were invalid and NYTC was entitled to reimbursement for previous payments.

In the *Word of Life Ministries v. Nassau County*,[31] the Court of Appeals held that the Word of Life Ministries properties that are used as residences for pastors are exempt from real property tax under RPTL § 462. Section 462 "states that 'property owned by a religious corporation while actually used by the officiating clergymen thereof for residential purposes shall be exempt from taxation.'" The court declined to adopt a restrictive definition of "officiating," holding that the determination is based on the "cleric's relationship with his or her congregation, and not the hierarchal structure of the various clergy positions."[32] The pastors who live at the properties in question all are ordained and take part in church services and share in the preaching and thus are "officiating clergy" entitling the ministry to exemption under § 462.

State Environmental Quality Review Act

In *City Council of the City of Watervliet v. Town of Colonie*,[33] the Court of Appeals held that "SEQRA requirements apply to all annexations under article 17 of the General Municipal Law, but that the extent of environmental assessment that must be undertaken is dependent on the specific development plans associated with the transfer of territory."[34] Municipal Annexation Law, article 17 of the General Municipal Law, outlines the procedures required to effectuate an annexation of land from one municipality to another. In the present case, East-West Realty Corporation sought to have 43 acres annexed from the Town of Colonie to the adjacent City of Watervliet. The Colonie zoning law permits single-family residences and East-West intended to build assisted living senior apartments. The Municipal Annexation Law requires a finding by both municipalities that the annexation is in the "over-all public interest." Watervliet determined that it was, but Colonie decided that an environmental review under SEQRA is necessary to determine if the annexation is in the public interest. At issue is whether SEQRA applies to municipal annexations even though the Municipal Annexation Law provides detailed procedures for annexation and does not explicitly incorporate SEQRA. The court held that "SEQRA promotes, rather than undermines, the public interest purposes of article 17 of the General Municipal Law and therefore . . . General Municipal Law § 718 (5) does not exempt the annexation process from SEQRA review."[35]

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[1] 4 N.Y.3d 1 (2004).
[2] *Id.* at 12; see Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994)).
[3] *Id.* at 14.

[4] 125 S. Ct. 2074 (2005).
[5] *Id.* at 2083.
[6] *Id.* at 2081 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).
[7] *Id.* at 2081 (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992)).
[8] *Id.* at 2086 (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994)).
[9] *Id.* at 2081 (citing Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978)).
[10] *Id.* at 2082.
[11] 4 N.Y. 3d 159 (2005).
[12] *Id.* at 165 (quoting Matter of Crown Commc'n N.Y., Inc. v. Dep't of Transp. of N.Y., City of New Rochelle et al., 765 N.Y.S.2d 898, 901 (N.Y. App. Div. 2003)).
[13] *Id.*
[14] *Id.* at 166 (quoting *In re* County of Monroe, 72 N.Y.2d 338, 341 (1988)).

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[15] *Id.* at 167.
[16] *Id.*
[17] *Id.* at 168.
[18] No.78, 2005 N.Y. LEXIS 1134 (May 10, 2005).
[19] *Id.* at *4.
[20] No. 120, 2005 N.Y. LEXIS 1572 (July 6, 2005).
[21] Following the Court of Appeals ruling, the village issued an order requiring Metro Enviro to stop accepting trash and to begin a 90-day closing process. A supreme court judge issued a temporary restraining order allowing the waste transfer station to remain open while he reviews a new lawsuit brought by Metro Enviro and its landlord. Metro Enviro claims that it is a nonconforming use and as such can operate without a special permit. A ruling is expected late summer.

Metro Enviro has also instituted a proceeding to have its facility and the 1,600 foot rail spur linking it to the Metro North Commuter Rail Road tracks declared a "railroad" that is exempt from state and local regulation. This proceeding is before the federal Surface Transportation Board and is being opposed by the village.
[22] *Metro Enviro Transfer*, 2005 N.Y. LEXIS 1572, at *4.
[23] *Id.* at *4-*5 (quoting Market Square Properties, Ltd. v. Guilderland Zoning Bd. of Appeals, 66 N.Y.2d 893 (1985)).
[24] *Id.* at *6.
[25] *Id.* at *7 (quoting Retail Prop. Trust v. Bd. of Zoning Appeals, 98 N.Y.2d 190 (2002)).
[26] 3 N.Y.3d 563 (2004).
[27] N.Y. REAL PROP. TAX LAW § 1573(2)(b)(B)-(C) (McKinney 2003).
[28] Malta Town Ctr. I, Ltd. v. Town of Malta Bd. of Assessment Review, 3 N.Y.3d 563, 575 (2004).
[29] N.Y. Tel. Co. v. Supervisor of Oyster Bay, 4 N.Y.3d 387, 392 (2005)
[30] *Id.* at 394.
[31] 3 N.Y.3d 455 (2004).
[32] *Id.* at 458.
[33] 3 N.Y.3d 508 (2004).
[34] *Id.* at 513.
[35] *Id.* at 516.